NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

In re:	Case No. 15-22434-B-7
PHILIP MICHAEL ROBERTS,	Adversary No. 15-2115
Debtor(s).	
SHARON BARTH,	
Plaintiff,	
v.	
PHILIP MICHAEL ROBERTS,	
Defendant.	

DECISION AFTER TRIAL

INTRODUCTION

This is an adversary proceeding to except debts from discharge under 11 U.S.C. § 523(a)(2)(A) for fraudulent representations (or misrepresentations) and under 11 U.S.C. § 523(a)(4) for defalcation while acting in a fiduciary capacity.

Plaintiff Sharon Barth initially filed a complaint against defendant Philip Michael Roberts in the Sacramento County Superior Court on June 10, 2014. That state court complaint alleged claims for intentional misrepresentation, breach of fiduciary duty, negligent misrepresentation, and breach of contract. While that state court action was pending, defendant filed a chapter 7 petition in this court on March 31, 2015. The bankruptcy case stayed the state court action.

Plaintiff filed the complaint that initiated this adversary proceeding on June 5, 2015. Defendant filed his answer on July 20, 2015. Trial was held on June 6, 2017. Appearances were noted on the record.

The court takes judicial notice of the docket in this adversary proceeding and in the underlying chapter 7 case. The court's pre-trial rulings stated on the record are incorporated into and made a part of this decision. This decision constitutes the court's findings of fact and conclusions of law made pursuant to Federal Rule of Civil Procedure 52(a) applicable by Federal Rule of Bankruptcy Procedure 7052.

JURISDICTION AND VENUE

Federal subject matter jurisdiction is founded on 28 U.S.C. § 1334. This adversary proceeding is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A), (I), and (O). To the extent this adversary proceeding may ever be determined to be a matter that a bankruptcy judge may not hear and determine without consent, the parties have nevertheless consented to such determination by a bankruptcy judge. See 28 U.S.C. § 157(c)(2). Venue is proper under 28 U.S.C. § 1409.

BACKGROUND

Plaintiff holds a Bachelor of Science degree in nursing from California State University, Sacramento. Plaintiff has been a registered nurse since 1991. From 1990 to 2013 plaintiff worked for Kaiser Foundation Hospitals. Her last position was as an Assistant Nurse Manager for Roseville and Sacramento hospitals.

Plaintiff currently works for the California Department of Public Health as a Health Facilities Evaluator Nurse.

Defendant is 39 years old and is plaintiff's son-in-law. Defendant married plaintiff's daughter in 1993. Defendant and plaintiff's daughter are co-debtors in the underlying chapter 7 case. This adversary proceeding is filed against defendant only.

For most of the relevant time, plaintiff lived with defendant and his wife (plaintiff's daughter) and defendant's children (plaintiff's grandchildren) in one household and as a single family unit. The relationship between plaintiff and defendant was close. For example, the parties shared living expenses. Plaintiff and defendant also shared the same accountant and scheduled their respective meetings with the accountant at the same time. Defendant would regularly sit in on plaintiff's meetings with the accountant; however, during defendant's meetings with the accountant plaintiff was required to wait outside in a car.

Plaintiff lived with defendant and his family initially in California. They all subsequently moved to Florida where they lived until about February 2013 when plaintiff learned that defendant intended to divorce his wife (plaintiff's daughter). Thereafter, defendant returned to California with his 20-year old girlfriend. Plaintiff returned to California sometime later.

I. PLAINTIFF'S LOANS TO DEFENDANT

A. The "House-Flipping" Loans

From 2004 to 2006 plaintiff made a series of loans to defendant. Defendant repaid each of the loans that were made during that period.

In 2006 defendant became a licensed contractor. He began working under the name Diamond Lighting Designs. Defendant's contractor license is currently inactive.

Beginning in the spring of 2009 plaintiff loaned defendant money so that defendant could purchase, renovate, and resell residential properties, *i.e.*, "house-flipping". Defendant told plaintiff that he would renovate the residential properties he purchased with loans from her and that he would repay her the loan principal at 10% interest when he resold a renovated property. Thereafter, with three separate loans from the plaintiff (collectively, unless noted otherwise, the "House-Flipping" loans), defendant purchased three residential properties identified as: (1) 2628 Lexington St., Sacramento, CA ("Lexington"); (2) 5700 Brett Dr., Sacramento, CA ("Brett"); and (3) 2132 Tevis Rd., Sacramento, CA ("Tevis").

The House-Flipping loans were all verbal agreements. There are no loan documents or promissory notes to evidence any of the loans.[1]

1. The Lexington Loan

In May of 2009 plaintiff loaned defendant $24,000.00 to purchase Lexington. Defendant purchased Lexington for $19,521.45 and made renovations to the property.

Defendant encountered difficulties selling Lexington and so he convinced plaintiff to buy the property from him for

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[1]To be clear, the funds that plaintiff gave defendant to buy the three residential properties were loans. Plaintiff did not give those funds to defendant as an investment or as a gift and she was not defendant's partner in the "house-flipping" business.

$95,000.00 based on a representation that the purchase would allow plaintiff to recoup a portion of her loan for the initial purchase of the property and preserve equity. Defendant also told plaintiff that he would manage the property as a rental for plaintiff.

Defendant received $93,254.00 from escrow upon the close of the Lexington sale. According to plaintiff, Lexington is currently worth approximately $145,000.00.

2. The Brett Loan

In August of 2009 plaintiff loaned defendant $125,715.58 to purchase, renovate, and resell Brett. Defendant purchased Brett for $91,692.55.

Defendant renovated Brett and resold the property in December 2009 for $138,504.58. Defendant received $125,711.00 from the sale.

Plaintiff's Exhibits 1 and 23 reflect that defendant repaid plaintiff at least $107,899.00 when he resold Brett. Plaintiff's Exhibit 1 is a spreadsheet that plaintiff testified is true and correct and was prepared for this litigation. That spreadsheet includes a section at Exhibit 1-2 captioned "Funds Repaid to Sharon" which reflects a "payment" of $60,000.00 and a "payment" of $47,899.00, for a total of $107,899.00. Those payments correspond with plaintiff's Exhibit 23-1 which is a spreadsheet that defendant prepared after he resold Brett and which reflects a payment to "Sharon" of "$107,899.00".[2]

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[2]Plaintiff denied that defendant repaid $107,899.00 of the Brett loan. Plaintiff's denial is not credible and the court believes that defendant repaid at least $107,899.00 of that loan.

3. The Tevis Loan

From October 2009 and into 2010 plaintiff loaned defendant a total of $195,475.00 to buy, renovate, and resell Tevis which defendant purchased for $120,000.00.

After making renovations, defendant resold Tevis in December 2010 for $192,000.00 He received approximately $173,605.91 from that sale. In December of 2010, defendant also repaid plaintiff $165,540.00 from the Tevis sale.

B. Medical Charting Business Loan

In May of 2010, defendant induced plaintiff to loan him $6,000.00 so that he could invest in a computerized medical chart business. Plaintiff took a cash advance on a credit card and incurred fees and finance charges to make this loan to defendant. In addition, defendant induced plaintiff to give him an additional $6,000.00 for plaintiff's own investment in the same computerized medical chart business.

Defendant did not provide plaintiff with any evidence of his purchase of shares of the computerized medical chart business. It was not until March of 2013 that plaintiff discovered that all of the shares of the medical chart business that defendant purchased with the $6,000.00 she loaned defendant and the

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The court does not believe plaintiff's denial because plaintiff's testimony became evasive and contradictory when she was asked about the two payments totaling $107,899.00 on Exhibit 1-2 and the payment of $107,899.00 from the Brett sale on Exhibit 23-1. Plaintiff testified that the section of Exhibit 1-2 that referenced the two payments totaling $107,899.00 was included by her former attorney and then immediately thereafter stated she could not answer or explain how that section was included on the spreadsheet. Plaintiff also testified she had no record of any "deposit" of the two payments which is different from not having any record of "receipt" of the payments.

additional $6,000.00 she gave defendant for her purchase of shares were placed in defendant's name.

C. Tevis Litigation Loan

In 2012 plaintiff and defendant were sued for construction defects arising out of Tevis renovations. Defendant paid the litigation expenses and attorney's fees totaling $16,724.44 incurred in that matter. Plaintiff paid those expenses based on defendant's representations that he would repay them all.

II. LEXINGTON PROPERTY MANAGEMENT

After plaintiff bought Lexington from defendant, defendant acted as a property manager for Lexington from approximately June 2010 through March 2013 as he initially told plaintiff he would. There is no written property management agreement. The agreement was entirely verbal.

Defendant was not a licensed real estate broker or agent when he managed Lexington. Defendant managed Lexington for plaintiff solely in his capacity as plaintiff's relative by marriage. Put another way, defendant managed Lexington as plaintiff's son-in-law.

Although defendant provided his accountant with financial information about Lexington between 2010 and 2013, he did not provide plaintiff with any similar accounting during that same period. Defendant also refused to provide plaintiff with bank records relevant to his management of Lexington when plaintiff requested those documents in or about March 2013.

It was not until after plaintiff terminated defendant as the Lexington property manager in March of 2013 that she learned rents defendant collected from Lexington tenants between 2010 and

2013 were not deposited into a separate account and were deposited into the defendant's business account. This included a security deposit which defendant received from one tenant and used as a partial refund of a security deposit owed to another tenant. Defendant's testimony confirmed this. In March 2013, plaintiff also discovered that bills associated with Lexington had not been paid and, in fact, tax and utility bills for the property remained unpaid or underpaid. Defendant's testimony also confirmed this. And in March of 2013, plaintiff also discovered that defendant charged for repairs to Lexington that were never performed. Testimony of Lexington tenant Rose Scott confirmed this.

DISCUSSION

I. THE § 523(a)(2)(A) CLAIMS

Plaintiff seeks to have several loans she made to defendant declared non-dischargeable under 11 U.S.C. § 523(a)(2)(A) which states as follows:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt -
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> . . .
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by - (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition[.]

11 U.S.C. § 523(a)(2)(A).

Plaintiff's § 523(a)(2)(A) claims as they pertain to her loans to defendant are based on misrepresentation theories. The misrepresentations alleged to have been made by the defendant to

the plaintiff are as follows:

(1) from 2007 through 2010, regarding the terms of repayment for the House-Flipping loans;

(2) in or about May 2010, regarding the purchase of shares in a computerized medical chart business;

(3) in or about July 2010, regarding the recoupment of a portion of the Lexington loan and preservation of equity if plaintiff purchased that property from defendant;

(4) from July 2010 through March 2013, regarding activities and irregularities while acting as property manager of Lexington; and

(5) in 2012 regarding the expenses incurred in Tevis construction defect litigation against plaintiff and defendant.

A creditor seeking to except a debt from discharge under § 523(a)(2)(A) based on a misrepresentation theory must establish five elements: (1) misrepresentation(s), fraudulent omission(s), or deceptive conduct; (2) knowledge of the falsity or deceptiveness of such representation(s), omission(s), or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor; and (5) damage to the creditor proximately caused by its reliance.[1] Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219,

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[1]The court is aware of Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581 (2016). Plaintiffs who file § 523(a)(2)(A) claims often cite Husky, sometimes as an after-thought when they have failed to establish a misrepresentation, for the proposition that misrepresentation is not an element of a § 523(a)(2)(A) claim. However, in Husky itself the Supreme Court acknowledged that it was not altering the requirement that a plaintiff prove traditional § 523(a)(2)(A) elements when a § 523(a)(2)(A) claim is based on a misrepresentation theory. Id. at 1589-90. A number of lower courts have reached the same conclusion. In re Jahedi, 2017 WL 1034681, *4 n.4 (Bankr. C.D. Cal. 2017); In re Katchtourian, 2016 WL 4267937, *4 n.3 (Bankr. C.D. Cal. 2016); see also In re Matthews, 2016 WL 5746251, *16 (Bankr. C.D. Cal. 2016). A few courts have even suggested that Husky is limited to actual fraud claims in the context of fraudulent transfer

1222 (9th Cir. 2010); Shannon v. Cardenas (In re Shannon), 553 B.R. 380, 388 (9th Cir. BAP 2016). All elements must be established by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291 (1991).

As explained below, plaintiff has failed to carry her burden of proving that defendant obtained the "House-Flipping" loans and part of the computerized medical chart loan by false representations (or misrepresentations). Plaintiff has also failed to prove that her reliance on defendant's representations that he would repay plaintiff the Tevis litigation expenses was justified. Therefore, defendant's debts to plaintiff arising out of those obligations will be discharged. On the other hand, as to a part of computerized medical chart loan and the loss that plaintiff suffered as a result of defendant's management of Lexington, defendant's debts to plaintiff arising out of those obligations will not be discharged.

A. The Loans

1. The "House-Flipping" loans are dischargeable and will be discharged.

a. Recovery on the "House-Flipping" loans is barred by the statute of limitations.

A non-dischargeability action involves two separate and distinct causes of action: "one is on the debt, as determined by state law, and the other is on the dischargeability of that debt,

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schemes. See In re Castro, 2016 WL 5879596, *9 n. 25 (Bankr. N.D. Cal. 2016); see also Yim v. Chaffee (In re Chaffee), 2017 WL 1046057, *8 (9th Cir. BAP 2017). In any case, inasmuch as plaintiff's § 523(a)(2)(A) claims are based on misrepresentation theories, fraudulent representations (or misrepresentations) and/or omissions remains element of the claims.

as determined by federal law." Roussos v. Michaelides (In re Roussos), 251 B.R. 86, 93 (9th Cir. BAP 2000). Here, the "House-Flipping" loans are all barred by the statute of limitations which means that, as to those loans, there are no actionable debts to except from discharge under § 523(a)(2)(A).

There are two statute of limitations issues in the § 523(a) context. Banks v. Gill Distribution Ctrs., Inc. (In re Banks), 263 F.3d 862, 868 (9th Cir. 2001). One arises under Federal Rule of Bankruptcy Procedure 4007(c) and is a deadline for filing the § 523(a) complaint. Id. That one is met here and is not at issue. The other relates to the underlying debt which the plaintiff seeks to have declared non-dischargeable. "[T]he establishment of the debt itself ... is subject to the applicable state statute of limitations." Id. Thus, "[a] debt barred by the applicable state statute of limitations will not support a dischargeability action." In re Moore, 2014 WL 3570600, *5 (Bankr. E.D. Cal. 2014) (citing Banks, 263 F.3d at 868)).

Inasmuch as the § 523(a)(2)(A) claims that pertain to the "House-Flipping" loans are based on misrepresentations they are grounded in fraud. The statute of limitations for fraud claims in California is three years. See Cal. Code Civ. Proc. § 338(d).

Sequentially, any fraud associated with the Brett loan was or should have been known as late as January 2010, after that property sold in December 2009 and plaintiff received a spreadsheet from defendant accounting for the sale. Any fraud associated with the Lexington loan was or should have been known by July 2010 when plaintiff purchased that property from the defendant. And any fraud associated with the Tevis loan was or

should have been known by December 2010 when that property was sold and plaintiff received a spreadsheet from the defendant accounting for the sale. There were no other payments on the loans after December 2010.

This adversary proceeding was filed on June 5, 2015, which is outside the applicable three-year limitations period for fraud associated with the House-Flipping loans. The court is aware that plaintiff filed a state court action against the defendant on June 10, 2014. And it is true that an underlying claim may not be time-barred for non-dischargeability purposes if it was asserted in a timely-filed pre-petition action even if that pre-petition action is not litigated to a final judgment. Banks, 263 F.3d at 868; see also Jett v. Sicroff (In re Sicroff), 401 F.3d 1101, 1103 n.3 (9th Cir. 2005). Here, however, the complaint that initiated the state court action against the defendant was not timely insofar as it was filed in June of 2014, which means it was filed over six months after the applicable limitations period lapsed, at the latest, in December of 2013 following the cessation of payments on the House-Flipping loans.

In sum, there are no actionable fraud claims with respect to the House-Flipping loans which means there are no actionable debts created by any of those loans to except from discharge under § 523(a)(2)(A). Therefore, defendant's debts to plaintiff arising out of the House-Flipping loans are dischargeable and will be discharged as to the defendant in his chapter 7 case.

b. Even if not time-barred, plaintiff did not prove that defendant obtained the "House-Flipping" loans by false representations (or misrepresentations) or an intent to deceive.

As they pertain to the House-Flipping loans, plaintiff's § 523(a)(2)(A) claims are fraudulent inducement claims. The focus of such claims are the misrepresentations made at loan inception. Ghadimi v. Ashai (In re Ashai), 211 F. Supp. 2d 1215, 1236 (C.D. Cal. 2016) (citing Hopper v. Lewis (In re Lewis), 551 B.R. 41, 48 (Bankr. E.D. Cal. 2016)); Husain v. Chopra (In re Chopra), 2013 WL 1681773, *8 (Bankr. N.D. Cal. 2013) ("To establish a non-dischargeable debt under section 523(a)(2)(A), the 'target misrepresentation must have existed at the inception of the debt, and a creditor must prove that he or she relied upon that misrepresentation.'"). And as to representations made at loan inception, "[t]he intention not to perform must be present when the agreement is formed; otherwise only a breach of contract is proven." In re Yaikian, 508 B.R. 175, 186 (Bankr. S.D. Cal. 2014). Moreover, false representations made after the defendant obtains the loan do not count and will not support a non-dischargeability claim under § 523(a)(2)(A). See Houng v. Tatung, Co., Ltd. (In re Houng), 499 B.R. 751, 766 n. 49 (C.D. Cal. 2013), aff'd, 636 Fed. Appx. 396 (9th Cir. 2016); Burlington Indus., Inc. v. Wilson (In re Wilson), 114 B.R. 249, 252 n.9 (Bankr. E.D. Cal. 1990).

The misrepresentations made at loan inception here pertain to the terms of repayment. In other words, plaintiff asserts that defendant's representations that defendant would repay loan principal at 10% interest when a residential property was resold

were made to induce her to enter into the House-Flipping loans and at the time defendant made those representations he had no intention of performing any of those terms. Although it is true that the House-Flipping loans were not repaid according to their promised terms, it is also significant that each of those loans were in some measure repaid after defendant renovated and sold each of the respective residential properties.

Plaintiff received at least $107,899.00 in repayment of the Brett loan, $165,540.00 in repayment of the Tevis loan, and over $25,000.00 in the form of equity in repayment of the Lexington loan. Thus, in addition to renovating each of the residential properties that defendant purchased with the House-Flipping loan, defendant in some manner attempted to repay each of those loans. That he failed and was unable to do so does not mean that he had no intent to perform when each loan was made. In fact, plaintiff's expert witness Lee Bartholomew testified that the movant lost a little over 10% in value on a unit basis during the 2009-2010 period. Thus, it is entirely plausible that defendant's inability to repay the House-Flipping loans as he initially promised resulted from circumstances outside of his control.

The important point here is that defendant renovated each of the three properties he purchased with loans from the plaintiff and made an effort to repay plaintiff following renovations and resales. In fact, defendant repaid plaintiff a substantial portion of each of the House-Flipping loans. Those repayments support a benign intent rather than fraud. See Anastas v. Am. Savings Bank (In re Anastas), 94 F.3d 1280, 1287 (9th Cir. 1996)

(partial payment supports no intent to defraud). They also reflect that defendant's statements that he would repay plaintiff were not false at the time they were made.

At best, defendant breached his oral agreements with the plaintiff. However, a contractual breach does not give rise to an actionable claim for non-dischargeability under § 523(a)(2)(A). See In re King, 258 B.R. 786, 794-95 (Bankr. D. Mont. 2001); see also Arciniega v. Clark (In re Arciniega), 2016 WL 455428, *11 (9th Cir. BAP 2016) (damages based on a mere breach of contract, even an intentional breach, are not excepted from discharge under § 523). Therefore, if not barred by the statute of limitations, for these alternative reasons defendant's debts to plaintiff arising out of the House-Flipping loans are dischargeable and will be discharged as to the defendant in his chapter 7 case.

2. The computerized medical chart loan is partially non-dischargeable and will not be fully discharged.

On the other hand, defendant's representation to plaintiff that he would invest $6,000.00 for her was false and was known by the defendant to be false when it was made. By placing all shares purchased for $12,000.00 in his name upon purchase, the court is persuaded that defendant had no intention of putting any of the shares in plaintiff's name and defendant told plaintiff that he would put $6,000.00 of the shares in her name so that he could obtain an additional $6,000.00 from her for his personal benefit. Therefore, the $6,000.00 that plaintiff gave defendant for her purchase of shares is not dischargeable and as to the defendant will not be discharged in his chapter 7 case.

As to the other $6,000.00 that plaintiff loaned defendant to use for *his* investment, the court is not persuaded plaintiff obtained those funds from the plaintiff by misrepresentation. After all, defendant invested those funds on his behalf as he told plaintiff he intended to do. Nor is the court persuaded that plaintiff's reliance on defendant's representation that he would repay funds he borrowed from the plaintiff for his investment is justified. Investments inherently involve risk and that risk includes loss. Therefore, as to this $6,000.00, it is dischargeable and will be discharged as to the defendant in his chapter 7 case.

3. The Tevis litigation costs are dischargeable and will be discharged.

As to the 2012 Tevis litigation costs, plaintiff's reliance on defendant's representations that he would repay plaintiff for her payment of those expenses is not justifiable. See Field v. Mans, 516 U.S. 59, 74-75 (1995). Reliance falls below the justifiable standard when "red flags" are ignored. Anastas v. Am. Sav. Bank (In re Anastas), 94 F.3d 1280, 1286 (9th Cir.1996) (citation omitted); In re Semenyuk, 2015 WL 5177818, *4 (Bankr. E.D. Cal. 2015). And here, "red flags" were ignored.

By 2012 plaintiff had experienced problems with defendant's repayment of the House-Flipping loans. There was some repayment; however, as discussed above, those loans were not repaid according to their promised terms. Despite those breaches, plaintiff chose to advance defendant additional funds in the form of the Tevis litigation expenses in reliance on defendant's representation those too would all be repaid.

Given defendant's loan repayment history in 2012, particularly his failure to repay the House-Flipping loans as initially promised, plaintiff was not justified in relying on defendant's representation that he would repay her the 2012 Tevis litigation expenses. See Copper v. Lemke (In re Lemke), 423 B.R. 917, 924 (10th Cir. BAP 2010) (holding that reliance was not justifiable because plaintiff continued to lend money "after various red flags arose"). Therefore, defendant's debt to plaintiff arising out of the 2012 Tevis litigation expenses is dischargeable and as to the defendant will be discharged in his chapter 7 case.

B. The Fraudulent Concealment Claim

The § 523(a)(2)(A) claim as it pertains to defendant's misrepresentations in his capacity as the Lexington property manager is based on omissions. In other words, defendant kept material financial information regarding rents collected, bills and taxes paid, security deposits, and repairs from plaintiff while working as the Lexington property manager for plaintiff.

An omission can satisfy the misrepresentation element of § 523(a)(2)(A) if there is a duty to disclose. Citibank (South Dakota) N.A. v. Eashai (In re Eashai), 87 F.3d 1082, 1089 (9th Cir. 1996); Bacino v. Federal Deposit Ins. Co. (In re Bacino), 2015 WL 9591904, *23 (9th Cir. BAP 2015); see also Cooke v. Howarter (In re Howarter), 114 B.R. 682, 684 n.2 (9th Cir. BAP 1990) (noting that the debtor's silence or concealment of a material fact can create a false impression which constitutes a misrepresentation actionable under § 523(a)(2)(A)). Here, however, because defendant managed Lexington as plaintiff's son-

in-law and not as a licensed real estate broker or agent, as plaintiff's expert witness Linda Ruteledge testified, under California real estate law, defendant was not a fiduciary. Thus, at least under California real estate law, defendant would not have had a duty of disclosure.

However, California law recognizes that in transactions that do not involve a fiduciary duty to disclose the non-disclosure of material facts may nevertheless be actionable in three instances: (1) if the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render the disclosure likely to mislead; (2) if the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; or (3) if the defendant actively conceals discovery from the plaintiff. Marketing West, Inc. v. Sanyo Fisher (USA) Corp., 6 Cal. App. 4th 603, 613 (1992) (citation omitted). The second and third instances are applicable here.

Inasmuch as plaintiff testified that defendant did not disclose any financial information relevant to his management of Lexington, there could not have been any partial disclosure by the defendant that required further disclosure or rendered any partial disclosure misleading. However, defendant provided financial information about Lexington and his management of Lexington to his accountant. And while plaintiff and defendant shared the same accountant, plaintiff did not have access to information defendant provided to their accountant. That means the financial information that defendant provided the accountant he shared with plaintiff about Lexington was known only to the

defendant and the accountant, and defendant knew that financial information was not known to or reasonably discoverable by the plaintiff. In addition, when plaintiff asked defendant for bank records to substantiate an accounting of his activities as the Lexington property manager defendant refused to produce those records. Thus, defendant also actively concealed financial information about Lexington from the plaintiff.

The court is persuaded that defendant had financial information relevant to Lexington and his management of Lexington under his control that he knew only he had access to and which was not discoverable by the plaintiff or, alternatively, defendant actively concealed that financial information from the plaintiff. Both circumstances give rise to an obligation to disclose under California law the failure of which is an omission that satisfies the misrepresentation element of plaintiff's § 523(a)(2)(A) claim. The court is also persuaded that defendant withheld that financial information from the plaintiff because of irregularities and improprieties in the collection of rents, the deposit of rents collected into defendant's business bank account, payment of bills and taxes, misuse of a security deposit, and a non-existent repair claim. The court was presented with no evidence of any "red flags" that would have alerted plaintiff to any of these irregularities which plaintiff only discovered in or around March of 2013 making her reliance on defendant's management of Lexington justified. Therefore, as the damage caused by defendant's omissions related to his management of Lexington in the amount of $9,684.13, that amount is not dischargeable and will not be discharged as to the defendant in

his chapter 7 case.

II. THE § 523(a)(4) CLAIM

The second claim for relief is based on plaintiff's alleged role as a fiduciary to the plaintiff as Lexington's property manager and a purported broker for plaintiff's investment in the computerized medical chart business. As explained below, the court concludes that neither are a § 523(a)(4) fiduciary.

Section 523(a)(4) excepts from discharge a debt "for fraud or defalcation while acting in a fiduciary capacity." To except a debt from discharge under § 523(a)(4), a creditor must prove by a preponderance of the evidence, Lovell v. Stanifer (In re Stanifer), 236 B.R. 709, 713 (9th Cir. BAP 1999), an express trust, the debt was caused by fraud or defalcation, and the debtor acted as a fiduciary to the creditor at the time the debt was created. Otto v. Niles (In re Niles), 106 F.3d 1456, 1459 (9th Cir. 1997). The focus here is the third element.

The definition of "fiduciary capacity" under § 523(a)(4) is a question of federal law. See Mills v. Gergely (In re Gergely), 110 F.3d 1448, 1450 (9th Cir. 1997). The Ninth Circuit has held that the broad, general definition of fiduciary—a relationship involving confidence, trust and good faith—is inapplicable in the dischargeability context. Double Bogey, L.P. v. Enea, 794 F.3d 1047, 1050 (9th Cir. 2015) (quoting Ragsdale v. Haller, 780 F.2d 794, 796 (9th Cir. 1986))). Thus, a "fiduciary" for purposes of § 523(a)(4) "must be one arising from an express or technical trust that was imposed before and without reference to the wrongdoing that caused the debt." Lewis v. Scott (In re Lewis), 97 F.3d 1182, 1185 (9th Cir. 1996). However, notwithstanding the

"technical" or "express" trust requirement, "state law may create a fiduciary relationship whose breach leads to nondischargeability under § 523(a)(4)." Shcolnik v. Rapid Settlements, Ltd. (In re Shcolnik), 670 F.3d 624, 628 (5th Cir. 2012).

Plaintiff produced no evidence of any express or statutory trust. In fact, plaintiff testified that no trust or trust agreement existed. Moreover, as explained above, as the plaintiff's son-in-law, defendant was not a fiduciary under California real estate law as Lexington's property manager.[2] Typically, that would end the inquiry. However, during closing argument plaintiff cited In re Douglass, 2015 WL 6446305 (Bankr. E.D. Tex. 2015), in which that court stated that "[i]t has been recognized that 'family relationships—where a person trusts in and relies upon a close member of her core family unit—may give rise to a fiduciary duty.'" Id. at *26. This court disagrees with Douglass for several reasons.

First, Douglass was decided under Texas not California law. Second, inasmuch as plaintiff's expert witness Linda Ruteledge testified that under California law defendant was not a fiduciary as Lexington's property manager *because of* his family relationship with the plaintiff, the Douglass holding that the family relationship created a fiduciary duty is at odds with

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[2]Plaintiff alleged that defendant was also a fiduciary as a broker for *her* investment in the computerized medical chart business. However, as explained above, since all shares the defendant purchased for the $12,000.00 that plaintiff gave him were placed in defendant's name, defendant did not invest for plaintiff. He invested entirely for himself.

California law. Third, family relationships that create fiduciary relationships under California law within the scope of § 523(a)(4) appear to be very limited and the mother-in-law/son-in-law relationship does not appear to be one of them. See e.g., Stanifer, 236 B.R. at 717 (spouses with respect to community property). Fourth, to the extent it relies on a close personal and confidential relationship among family members, Douglass is inconsistent with the Ninth Circuit's definition of a § 523(a)(4) fiduciary.

In short, plaintiff has not established that defendant acted as a § 523(a)(4) fiduciary. Therefore, judgment on the Second Claim for Relief will be entered in favor of the defendant and against the plaintiff with plaintiff taking nothing on the Second Claim for Relief.

III. PUNITIVE DAMAGES

Assuming the court has authority to award punitive damages in a § 523(a)(2)(A) non-dischargeability action, see In re Harper, 475 B.R. 540, 550 n. 24 (Bankr. S.D. Miss. 2012), as to plaintiff's request for punitive damages the court finds that the facts do not warrant any award of punitive damages in this matter. Although perhaps not according to their terms and not in the amounts promised, defendant made efforts to repay, and in fact did repay, a substantial amount of the money he borrowed from or that was extended by plaintiff. These facts do not meet (or even come close to) the heightened standard of conduct required for an award of punitive damages. Therefore, plaintiff's request for punitive damages will be denied.

CONCLUSION

Based on the foregoing,

IT IS ORDERED that judgment on the First Claim for Relief will be entered for the plaintiff and against the defendant in the amount of $15,684.13 which amount shall be non-dischargeable under 11 U.S.C. § 523(a)(2)(A).

IT IS FURTHER ORDERED judgment on the claim under 11 U.S.C. § 523(a)(4) in the Second Claim for Relief will be entered for the defendant and against the plaintiff with plaintiff taking nothing on the Second Claim for Relief.

IT IS FURTHER ORDERED that plaintiff's request for punitive damages is denied and no punitive damages are awarded.

IT IS FURTHER ORDERED that all other debts that defendant owes plaintiff which are not held to be non-dischargeable as provided herein shall be ordered discharged as to defendant in his chapter 7 case.

IT IS FURTHER ORDERED that the continued trial date of July 3, 2017, at 9:30 shall be and hereby is vacated.

Dated: June 26, 2017.

UNITED STATES BANKRUPTCY JUDGE

INSTRUCTIONS TO CLERK OF COURT
SERVICE LIST

The Clerk of Court is instructed to send the attached document, via the BNC, to the following parties:

Karen M. Goodman
3840 Watt Ave., Bldg. A
Sacramento CA 95821

Peter G. Macaluso
7230 South Land Park Drive #127
Sacramento CA 95831